United States Department of Labor
Employees' Compensation Appeals Board

N.G., Appellant	)	
and	)	**Docket No. 15-567**
	)	**Issued: April 27, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 12, 2015 appellant, through counsel, filed a timely appeal from an October 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss and compensation benefits effective January 13, 2014 as she no longer had any residuals or disability causally related to her January 25, 2013 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the October 7, 2014 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

On January 25, 2013 appellant, then a 37-year-old city carrier, filed a traumatic injury claim alleging that on that date she strained her neck and back when she was involved in a motor vehicle accident in the performance of duty.[3] She stopped work. OWCP accepted appellant's claim for neck sprain. It paid wage-loss compensation benefits. Appellant was initially treated by Dr. Maria Limberakis, a family practitioner, and Dr. Gautam Kothari, Board-certified in physical medicine and rehabilitation.

In a February 14, 2013 magnetic resonance imaging (MRI) scan report, Dr. Joel Swartz, a Board-certified diagnostic radiologist, noted appellant's history of neck and shoulder pain. He stated that there was no evidence of fracture, dislocation, or cervical cord compression. Dr. Swartz observed mild broad-based disc protrusion at C3-4 and C4-5, mild broad-based disc protrusion to some degree eccentric to the left at C5-6, and broad-based disc protrusion eccentric to the left at C6-7 compromising the left neural foramen.

On March 4, 2013 Dr. Kothari examined appellant for complaints of neck pain following a January 25, 2013 motor vehicle accident at work. He reviewed her history and observed tenderness to palpation in her cervical paraspinals and reduced range of motion in right-sided rotation. Spurling's maneuver reproduced axial neck pain and strength testing was otherwise 5/5 proximally and distally. Dr. Kothari noted that the shoulder examination demonstrated reduced range of motion at the terminal end range and mild positive impingement testing. He stated that the MRI scan of the cervical spine revealed degenerative disc disease, notably at C6-7. Dr. Kothari diagnosed axial neck pain in the setting of degenerative disc disease at C3-4 through C6-7 and cervical myofascial strain following a motor vehicle accident.

In an April 1, 2013 report, Dr. Kothari noted that appellant continued to have symptoms but had significantly improved with physical therapy. Upon examination he observed reduced range of motion in rotation of the spine and pain in the neck and left arm with Spurling's maneuver. Sensory examination revealed diminished sensation in the left proximal arm. Dr. Kothari diagnosed axial neck and proximal arm pain in the setting of cervical disc disease and cervical myofascial strain. He stated that appellant had radicular complaints and MRI scan findings consistent with left-sided disc herniation at C6-7 compromising the left C7 nerve root. Dr. Kothari opined that her symptoms, imaging findings, and physical examination were consistent with a motor vehicle accident. He reported that appellant had a component of myofascial pain, but that there was also a "component of disc disease contributing to her symptoms." Dr. Kothari authorized her to return to modified duty with restrictions of no lifting, pushing, or pulling more than 20 pounds.

On May 16, 2013 appellant returned to part-time light duty. She continued to undergo medical treatment, including physical therapy and cervical injections.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of appellant's accepted employment-related injuries

[3] The record reveals that appellant has a previously accepted traumatic injury claim for a March 26, 2009 employment injury.

and any continuing disability. In a June 14, 2013 report, Dr. Smith reviewed appellant's history, including the SOAF, and accurately described the January 25, 2013 employment injury. Upon examination, he observed no spasm, atrophy, trigger points, or deformity of the neck. Cervical range of motion was normal with no sign of spasm or rigidity. Dr. Smith stated that the neurologic examination was also objectively normal. He opined that appellant's accepted cervical sprain condition had resolved without residual and required no additional treatments. Dr. Smith stated that appellant could return to regular duty as a mail carrier without any restrictions.

In July 8 and August 5, 2013 reports, Dr. Kothari examined appellant for complaints of neck, chest, and arm pain. He noted that she experienced left-sided neck pain with intermittent spasticity and decreased range of motion. Dr. Kothari observed decreased spasticity and improved range of motion. He diagnosed left-sided axial neck pain improved following intraarticular facet injections and cervical strain. In the July 8, 2013 report, Dr. Kothari stated that appellant should return in four weeks and if she had improved, he would consider a trial full-duty work status. In the August 5, 2013 report, he diagnosed axial neck pain in the setting of cervical disc disease, cervical strain, and possible cervical facet syndrome. Dr. Kothari reported that he adjusted appellant's restrictions to allow her to use a mail cart instead of an over-the-shoulder mailbag and recommended that she continue other treatment alternatives.

OWCP determined that a conflict in medical evidence existed between appellant's treating physician and Dr. Smith, OWCP's referral physician, regarding whether appellant continued to suffer residuals and remained totally disabled from work as a result of the January 25, 2013 employment injury. It referred her claim, along with a SOAF and the medical record, to Dr. Stuart Trager, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict in medical opinion.[4]

In an October 9, 2013 report, Dr. Trager stated that he reviewed appellant's medical records and provided an accurate history of the January 25, 2013 work injury. He noted that her claim was accepted for neck sprain. Dr. Trager related appellant's current complaints of left shoulder pain, which radiated into the cervical region, nightly headaches, bilateral arm numbness and tingling, and trouble lifting. Upon examination, he observed tenderness to palpation of the medial periscapular region on the left but no tenderness to palpation of the cervical or thoracic spine within the midline or over the spinous processes. Cervical range of motion demonstrated 45 degrees of flexion, 45 degrees of extension, 65 degrees of right-sided turning, and 65 degrees of left-sided turning.

Dr. Trager stated that appellant's symptoms did not appear radicular in nature with intact reflexes, muscle strength, and sensibility on examination. He also noted that physical examination demonstrated no muscle wasting and reproducible tenderness at the level of the medial scapula consistent with diagnosis of myofascial pain rather than any cervical radiculopathy. Dr. Trager reported:

> "Absent any electrodiagnostic findings to support the diagnosis of ongoing radicular complaints and a normal physical examination without radicular finding,

[4] The record contains a copy of the ME023 Appointment Schedule Notification and a bypass history report indicating that appellant was scheduled to see Dr. Trager on October 9, 2013.

> ongoing symptoms at this time would appear to be consistent with myofascial pain in the region of the medial scapula only. There are no objective findings to support ongoing current symptoms at this time based upon physical examination…. While it is not possible to conclude with any degree of medical certainty that MRI [scan] findings which currently exist, were not present prior to the motor vehicle accident and appeared degenerative in nature, without an electrodiagnostic testing to suggest the presence of current symptoms being related to nerve root compression, it would appear that physical examination is not consistent with this diagnosis. Based upon the initial diagnosis of cervical sprain/strain, one would expect the symptoms to typically resolve by this time, and absent nerve root irritation demonstrated electrodiagnostically, there would not appear to be ongoing need for treatment at this juncture. My impression at this time would be unresolved myofascial pain without objective post-traumatic findings."

In a November 13, 2013 report, Dr. Steven J. Valentino, an orthopedic surgeon, examined appellant for complaints of neck pain bilaterally localized C4 thru C7 with radiation into the bilateral arms with paraesthesia and weakness. He noted that he reviewed her medical records and related that on January 25, 2013 she was involved in a motor vehicle accident at work. Upon examination, Dr. Valentino observed significantly limited range of motion in all planes. He stated that extension combined with side bending caused significant neck pain at C4 thru C7 bilaterally. Palpation of the spine revealed significant spasm and facet synovitis and effusion. Dr. Valentino reported that deep tendon reflexes were intact and motor and sensory examinations were normal. He diagnosed neck pain, facet mediated pain, cervical radiculitis, and neck sprain. Dr. Valentino recommended that appellant continue work in her current capacity with current limitations.

On November 22, 2013 OWCP proposed to terminate appellant's compensation and medical benefits based on Dr. Trager's October 9, 2013 impartial medical report which found that her employment-related injuries had resolved and that she was capable of returning to work. It determined that the weight of medical evidence rested with Dr. Trager who determined that appellant no longer suffered residuals of her January 25, 2013 employment-related injury and was able to return to work.

In a November 25, 2013 MRI scan of appellant's cervical spine, Dr. Swartz noted her history of neck pain and radiculopathy. He reported disc desiccation with mild-to-moderate disc protrusion eccentric to left at C3-4 and C4-5 and mild disc protrusion to the left C5-6 and C6-7. Dr. Swartz found no evidence of interval change when compared to the February 14, 2013 MRI scan.

In a November 25, 2013 MRI scan of the cervical spine, Dr. Anthony J. Limberakis, a Board-certified diagnostic radiologist, reported well-maintained disc spaces and vertebral body and no evidence of fracture or dislocation. He stated that the findings were consistent with muscle spasm.

In a December 2, 2013 neurologic examination, Dr. Joseph Moeller, a Board-certified neurologist, noted appellant's complaints of neck pain radiating into the left upper extremity that resulted from a January 25, 2013 work-related injury. He reported that the examination showed

normal tone and bulk. Motor studies of the bilateral median, radial, and ulnar nerves were also normal. Dr. Moeller concluded that the neurologic examination was a normal study.

In a December 5, 2013 statement, appellant's counsel, noted his objections to OWCP's November 22, 2013 proposal of termination letter. He contended that Dr. Trager's report was not based on an accurate medical history as he did not mention appellant's accepted March 26, 2009 right shoulder injury. Counsel further asserted that Dr. Trager's opinion was speculative in nature because his conclusions were based on an absence of electrodiagnostic findings. He alleged that Dr. Trager felt that an electromyography test would be appropriate to give a firm diagnosis and opinion on residual disability.

In a December 18, 2013 report, Dr. Valentino noted that appellant's complaints of neck pain bilaterally localized in C4 through C7 worse with prolonged posture and activity. He provided examination findings similar to his previous report and diagnosed neck pain, facet mediated pain, and cervical degenerative joint disease. Dr. Valentino recommended that appellant continue her restrictions at work.

By decision dated January 13, 2014, OWCP finalized the termination of appellant's disability compensation and medical benefits effective that day. It determined that the weight of the medical evidence rested with Dr. Trager's October 9, 2013 report which determined that appellant's employment-related injuries had resolved and that she was capable of returning to full duty.

On January 16, 2014 appellant's counsel submitted a request for an oral hearing. He resubmitted Dr. Kothari's reports and appellant's diagnostic reports. Appellant also submitted various physical therapy reports dated February 24 to July 24, 2014.

In a January 28, 2014 report, Dr. Valentino related appellant's complaints of neck pain radiating into the bilateral arms with paresthesia and weakness and attributed the symptoms to the January 25, 2013 work injury. He noted that a November 25, 2013 MRI scan showed disc desiccation at C3 through C7 and protrusion eccentric to the left at C3-4 with mild protrusions at C4-5, C5-6, and C6-7. X-rays of the cervical spine were normal. Upon examination, Dr. Valentino observed significant decreased range of motion in the cervical spine with neck pain reproduced with facet loading maneuvers and evidence of moderate spasm in the paracervical musculature. Spurling's maneuvers reproduced neck pain. Dr. Valentino diagnosed cervical sprain/strain with facet mediated pain, multilevel cervical protrusions and cervical radiculitis. He opined that these injuries were related to the work injury and recommended that appellant continued to need restricted duty. Dr. Valentino explained that, although appellant's injury had been accepted as a cervical strain/sprain, she also sustained multilevel protrusions, facet mediated pain, and cervical radiculitis. He reported that appellant continued to have residuals of her work-related injury and needed medical treatment.

In a February 10, 2014 report, Dr. Scott Fried, a Board-certified neurologist, described appellant's duties as a mail carrier and noted that she had been on limited modified duty working two hours per day because her work exacerbated and increased her symptoms. He related her major complaints of ongoing bilateral neck pain, posterior occipital nerve headaches, and symptoms down her upper trapezial and long thoracic nerve area following a motor vehicle accident at work. Dr. Fried provided an accurate history of the January 25, 2013 employment

injury and the subsequent medical treatment she received. He noted that a February 14, 2013 MRI scan showed disc bulge at C4-5, C5-6, and C6-7. Upon examination of the cervical spine, Dr. Fried observed tenderness at the left cervical paravertebral musculature at levels two to four and right cervical paravertebral musculature at levels three to seven. He also noted muscle spasm present at the right and left trapezius muscles and right and left cervical muscles. Range of motion was 45 degrees rotation to the right and left, 20 degrees of extension, and flexion within two inches of the chest.

Dr. Fried diagnosed cervical strain and sprain, disc bulge at C4-5, C5-6, and C6-7 with radiculopathy, and right shoulder rotator cuff strain and sprain. He stated that there was a "direct cause and effect relationship between this documented injury and the current clinical complaints and physical manifestations." Dr. Fried reported that appellant sustained significant injury from her January 25, 2013 motor vehicle accident, including a cervical strain and sprain with evidence of disc bulging at C4-7 discs. He also noted significant nerve root irritation and evidence of a C5-T1 radiculoapthy bilaterally, left side greater than right. Dr. Fried also stated that appellant suffered from ongoing rotator cuff tendinitis and subacromial impingement on the right secondary to her previous injury. He opined that she was capable of working modified duty with no regular reaching, pulling, pushing, and repetitive activity.

On June 19, 2014 a telephonic hearing was held. Appellant described her duties as a letter carrier and stated that she did not have any trouble with her neck, arms, or back until March 26, 2009 when she injured her right shoulder while putting one of the mail tubs into her truck. She also described the January 25, 2013 neck injury and reviewed the medical treatment she received. Appellant stated that she returned to part-time modified duty around May 16, 2013 but still experienced pain in her neck, left shoulder blade, and down her left arm.

Appellant's counsel contended that OWCP did not meet its burden of proof to terminate appellant's claim. He noted that the SOAF did not include her accepted March 2009 right shoulder injury. Counsel also asserted that appellant's physicians have demonstrated that she still had residuals from the January 25, 2013 work injury. He pointed out that MRI scan findings showed disc defects at multiple levels and that Drs. Kothari and Trager both noted that she had myofascial cervical strain syndrome. Counsel questioned whether Dr. Trager was properly selected as the referee medical examiner as he could not find any evidence of his selection from the Physician Directory System. He further alleged, however, that, if Dr. Trager was properly selected, his report was speculative and supported that appellant continued to suffer from myofascial pain in the left upper extremity as a result of the January 25, 2013 motor vehicle accident.

By decision dated October 7, 2014, an OWCP hearing representative affirmed the January 13, 2014 decision terminating appellant's wage-loss compensation and medical benefits.

LEGAL PRECEDENT

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.[5] OWCP may not terminate compensation without establishing that the disability had ceased or that it was no

[5] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

longer related to the employment.[6] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[8] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[9]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[10] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12]

ANALYSIS

OWCP accepted appellant's claim for neck sprain. In a June 14, 2013 report, Dr. Smith, an OWCP referral physician, determined that appellant's accepted January 25, 2013 condition had resolved and that she was capable of returning to regular duty as a mail carrier. In various reports dated March 4 to August 5, 2013, Dr. Kothari, appellant's physician, related that appellant continued to require medical treatment for her January 25, 2013 employment injury and needed work restrictions. To resolve the conflict between appellant's treating physician and its referral physician, OWCP referred appellant to Dr. Trager for an impartial medical examination.

In an October 9, 2013 report, Dr. Trager provided an accurate history of the January 25, 2013 work injury and noted that appellant's claim was accepted for neck sprain. He related appellant's complaints of continued left shoulder pain, which radiated into the cervical region. Upon examination, Dr. Trager observed tenderness to palpation of the medial periscapular region on the left but no tenderness to palpation of the cervical or thoracic spine within the midline or

[6] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[7] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[8] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[9] *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P., id.*

[10] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[11] 20 C.F.R. § 10.321.

[12] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

over the spinous processes. He provided cervical range of motion findings and stated that examination demonstrated no muscle wasting or reproducible tenderness. Dr. Trager opined that there were no objective findings to support ongoing current symptoms based upon his physical examination.

At the hearing and again on appeal, appellant's counsel continues to challenge the selection of Dr. Trager as the impartial medical specialist. The Medical Management Assistant (MMA), which replaced the Physicians Directory System, allows users to access a database of Board-certified specialist physician, and is used to schedule referee examinations. The application contains an automatic, and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician.[13] The Board notes that the record contains a September 19, 2013 ME023 iFECS report documenting the selection of Dr. Trager under the MMA. Additionally, the record also contains a bypass history report certifying that the MMA was used to schedule appellant's appointment with Dr. Trager and that no physicians were in fact bypassed.[14] Thus, the Board finds that OWCP provided documentation and properly utilized its MMA system in selecting Dr. Trager as the impartial medical examiner.

The Board finds, however, that OWCP improperly terminated appellant's compensation based on Dr. Trager's report because the opinion of Dr. Trager is not sufficiently rationalized to represent the special weight of the medical evidence. As noted, the report of an impartial medical specialist will be accorded special weight provided his opinion is sufficiently rationalized and based upon a proper factual background.[15] The Board looks at such factors as the opportunity for and thoroughness of examination performed by the physician, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed by the physician on the medical issues addressed to him by OWCP.[16]

In this case, the Board finds that Dr. Trager's opinion was based on a deficient SOAF. To assure that the report of a medical specialist is based upon a proper factual background, OWCP provides information through the preparation of the SOAF.[17] OWCP procedure manual requires that the SOAF facts include appellant's accepted conditions.[18] In this case, the Board notes that the September 17, 2013 SOAF did not note that appellant had a previously accepted claim for a right shoulder injury. Accordingly, Dr. Trager incorrectly reported that appellant did not have any prior orthopedic injuries. His report, therefore, was not based on a proper history or

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013); *see also R.C.*, Docket No. 12.468 (issued October 25, 2012).

[14] On the Bypass History report for the Scheduled Appointment, the comment input indicated: "No Bypasses are available."

[15] *Supra* note 12.

[16] *James T. Johnson*, 39 ECAB 1252 (1988).

[17] *Mirna Cruz*, Docket No. 06-183 (issued April 5, 2006).

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

background. The Board has found that when an OWCP referral physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, the probative value of the opinion is seriously diminished or negated altogether.[19]

As the conflict remains unresolved, the Board will reverse OWCP's October 7, 2014 decision and will remand the case for proper reinstatement of compensation benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits effective September 23, 2013.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 27, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[19] *A.R.*, Docket No. 11-692 (issued November 18, 2011); *see also supra* note 18.